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to have been settled finally in England by the case of *Dalton v. Southeastern Ry. Co.*, 4 C. B. (N. S.) 296, where Willes, J., interprets the statute as awarding "compensation for injury by reason of the relative not being alive" or in other words as merely providing a substitute for the earnings of the deceased. Under this construction funeral expenses would seem not to be recoverable and some courts in this country have adopted this view. *Consolidated Tract Co. v. Hone*, 60 N. J. L. 444; *Hutchinson v. West Jersey Ry. Co.*, 170 Fed. 615. But it is generally held in the United States that funeral expenses are a legitimate element of damages on the ground that they are a financial loss proximately resulting from the death of the deceased. *Secard v. Rhinelander Lighting Co.*, 147 Wis. 614. The principal case has apparently rejected both interpretations of the damage clause of the Death Act and has selected a middle ground by adopting the "loss to the estate" of the deceased as the true criterion of the measure of damages. Under this construction the decision of the principal case appears to be sound. See 2 British Ruling Cases 711.

DAMAGES—PROFITS—EARNING CAPACITY.—Plaintiff's husband, a blacksmith employing four or five assistants in his shop, and with a capital of \$2,200 invested in his business, was killed through the negligence of the defendant. For some years the deceased had contributed \$1,800 annually from the profits of his business to the support of his family; but this amount did not constitute the entire profits of the business. *Held*, this annual payment was proper evidence for the jury to consider as tending to show the deceased's earning capacity. *Baxter v. Phila. & Reading R. R. Co.* (Pa., 1919), 107 Atl. 881.

In every case involving loss of earnings, the true measure of damages is the value of the plaintiff's services to the business in which he was engaged. *Gilmore v. Phila. Transit Co.*, 253 Pa. 543; *Singer v. Martin*, 96 Wash. 231; *Walsh v. New York Cent., etc., R. R. Co.*, 204 N. Y. 58. (See note in 37 L. R. A. (N. S.) 1137.) And the value of such services is not measured by the loss of profits of the business. *Masterton v. Mount Vernon*, 58 N. Y. 391; *Goodhart v. Penna. R. R. Co.*, 177 Pa. 1; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208. But in cases where the returns from the business are the result solely of the plaintiff's physical and mental exertions, without a substantial investment of capital or the employment of the labor of others, profits may be proved as tending to show the earning power of the plaintiff. *Wallace v. Penna. R. R. Co.*, 195 Pa. 127 (boarding house keeper); *Buckman v. Phila. & Reading R. R. Co.*, 227 Pa. 277 (farmer and trucker); *McLane v. Pittsburg Railways Co.*, 230 Pa. 29 (huckster); *Lund v. Tyler*, 115 Ia. 236 (fisherman). The instant case does not fall within the latter classification because the returns of the business were not the result solely of the deceased's enterprise. Nor yet does it violate the general rule, for the court expressly says that if the total profits were taken as a measure of earning power, that would be error. But it allows the jury to estimate damages upon a basis of this sum, derived from the business from which the deceased had his sole source of income, which sum "represents a part of the net earnings

which were produced through the claimant's personal direction." The inference that this sum represented the value of the deceased's services to the business is based upon a careful analysis of detailed evidence concerning all the circumstances of the particular business. To the same effect see *Bogges v. Balt. & Ohio R. R. Co.*, 234 Pa. 379. And *Pill v. Brooklyn Heights R. R. Co.*, 6 Misc. Rep. (N. Y.) 267, jt. aff. 148 N. Y. 747, where it was held that the earning capacity of a corset maker employing two assistants was measured by the profits of the business. But see *Silsby v. Mich. Car Co.*, 95 Mich. 204, *contra*. See also note in 52 L. R. A. 33.

**DAMAGES—RULE OF HIGHEST INTERMEDIATE VALUE—ILLEGAL SALE OF MARGINED STOCK.**—Smith & Co. carried stock on margin for Berberich, and wrongfully sold it without notice. *Held*, that the proper measure of damages is the highest market value of the stock between the time of the conversion and the trial. *In re Berberich's Estate* (Pa., 1919), 107 Atl. 813.

Concerning the measure of damages for conversion of property of fluctuating value three rules have been followed. First, the value of the property at the time of conversion. *Layman v. Slocumb & Co.*, 7 Penn. (Del.) 403; *Continental Divide Mining Co. v. Bliley*, 23 Colo. 160. Second, the highest market value between the time of conversion and the trial. *Shroul v. Sloan*, 241 Pa. 284. Third, the highest market value between the time of conversion and a reasonable time to enable the owner to replace the property after he received notice of the conversion. *Baker v. Drake*, 53 N. Y. 211, 217; *Citizens' Street Ry. Co. v. Robbins*, 144 Ind. 671; *Page v. Fowler*, 39 Cal. 412; *Galigher v. Jones*, 129 U. S. 193. What constitutes a reasonable time is a question of law for the court where the facts are undisputed. *Wright v. Bank of Metropolis*, 110 N. Y. 237. The language of the court in the principal case indicates that the court believed it had only a choice between the first two rules. Clearly, the first rule is not a good one in such cases, for it enables the converter to buy the stock from the plaintiff at its present value whenever the wrongdoer so wills. And the second rule (followed in the principal case) encourages the plaintiff, by delaying the commencement of his action, to speculate upon the chances of higher markets. In addition, it is decidedly in conflict with the well-established rule that a party is required to use reasonable diligence to mitigate damages. *Wabash R. R. Co. v. Campbell*, 219 Ill. 312; *Wicker v. Hoppock*, 6 Wall. (U. S.) 94; 8 RULING CASE LAW 442. The third rule is consonant with the fundamental purpose of the law (in cases not justifying exemplary damages), viz., reparation to the injured party; and the said rule also harmonizes with the principle referred to above, because it requires the injured party to use due diligence to minimize the damage. All the plaintiff can reasonably demand is to be restored to his status as stockholder, and under the third rule he is allowed to invoke the remedy of self-help within a reasonable time after learning of the conversion and then call upon the tortfeasor for indemnity. It must be admitted that in case the injured party is financially unable to repurchase the stock within the reasonable time, he is not restored to his former position under the third rule, but this objection is applicable to all rules of damages. Damages, being